



PUBLIC NOTICE

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WIRELESS TELECOMMUNICATIONS BUREAU REMINDS WIRELESS LICENSEES OF CONSTRUCTION OBLIGATIONS

The Wireless Telecommunications Bureau (Bureau) issues this Public Notice to remind licensees of their buildout obligations—in particular, their existing obligations to timely meet the construction and coverage deadlines set forth in the Commission’s rules (collectively, “construction obligations”). The FCC’s construction obligations serve the important purpose of ensuring that scarce spectrum resources are put to use and deployed in a manner that serves all communities.¹ Indeed, the Commission’s construction obligations promote the Commission’s goal of making spectrum “available, so far as possible, to all the people of the United States” regardless of where they live.² The Commission has taken and will continue to take steps to facilitate the rapid deployment of wireless broadband and other services.³

Given these important purposes, the FCC has been clear that requests to extend construction obligations will not be routinely granted. The Commission’s rules and case law impose limits on the types of arguments and factual circumstances that would qualify a licensee for an extension. We thus take this opportunity to remind licensees that this long-standing approach to enforcing the FCC’s construction obligations will continue to apply going forward.

Construction obligations have functioned as a core part of the Commission’s wireless policy for decades. Commission rules and a wireless licensee’s FCC authorization describe construction obligations, *i.e.*, when and how wireless licensees must construct, commence service, and, as applicable, meet coverage and substantial

¹ See, e.g., 47 U.S.C. § 309. See also, e.g., *Amendment of the Commission’s Rules to Establish New Personal Communications Services*, Memorandum Opinion and Order, 9 FCC Rcd 4957, 5018-19, paras. 154-56 (1994) (imposing construction requirements to ensure effective spectrum use and promote nationwide coverage notwithstanding varying population densities); *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, 22 FCC Rcd 15289, 15348-49, paras. 154-55 (2007) (highlighting several important policy goals advanced by adoption of performance requirements, including to “better promote access to spectrum and the provision of service, especially in rural areas”); *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, Report and Order and Order of Proposed Modification, 27 FCC Rcd 16102, 16173-74, para. 187 (2012) (“The Commission establishes performance requirements to promote the productive use of spectrum, to encourage licensees to provide service to customers expeditiously, and to promote the provision of innovative services throughout the license area(s), including in rural areas.”).

² 47 U.S.C. § 151.

³ See, e.g., *supra* note 1; *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.; Revising the Historic Pres. Review Process for Wireless Facility Deployments*, WT Docket Nos. 17-79 and 15-80, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 17-38 (2017), 2017 WL 1443827; *Connect America Fund*, WC Docket No. 10-90, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 17-11, (2017), 2017 WL 931155, paras. 85-87 (highlighting importance of performance metrics in the context of deploying Mobility Fund II).

service benchmarks.⁴ As the Commission's rules specify, "if a licensee fails to commence service or operations by the expiration of its construction period or to meet its coverage or substantial service obligations by the expiration of its coverage period, *its authorization terminates automatically* (in whole or in part as set forth in the service rules), *without specific Commission action*, on the date the construction or coverage period expires."⁵

We take this opportunity to highlight these requirements, particularly given the Commission's recent and ongoing initiatives to ensure that wireless broadband is deployed in unserved or underserved areas, including rural and tribal areas.⁶ As the Bureau has previously made clear, it is a licensee's responsibility to conduct its due diligence, to assure that it can construct and meet service requirements, and to confirm that the spectrum is suitable for the licensee's business plans and needs.⁷ The Commission makes no representations or warranties about use of the spectrum, and a license is not a guarantee of business success.⁸

As a consequence, the Commission's rules do not contemplate extensions of construction deadlines for licensees that fail to meet construction obligations because of miscalculations or erroneous predictions about such factors as costs, demand, developments in the market, or timing and success in obtaining permissions that may be necessary for construction. Rather, we have always expected licensees to factor in these considerations from the start because construction obligations are the building blocks to making available service that puts scarce spectrum resources to use. When a licensee fails to deploy on a timely basis, the Commission holds the licensee accountable in accordance with its rules. Specifically, under Section 1.946(e) of the Commission's rules, extensions of the time period for meeting these construction and service requirements are permitted only in two situations—either "involuntary loss of site" or "other causes beyond [a licensee's] control."⁹ This rule specifically cautions that the following do

⁴ See, e.g., 47 CFR § 1.946(a)("[f]or each of the Wireless Radio Services, requirements for construction and commencement of service or commencement of operations are set forth in the rule part governing the specific service"), (b)("[i]n certain Wireless Radio Services, licensee must comply with geographic coverage or substantial service requirements within a specific time period. These requirements are set forth in the rule part governing each specific service.").

⁵ See *id.* § 1.946(c) (emphases added). The service rules for certain radio services specify that a licensee's failure to meet its interim construction requirement accelerates the licensee's final construction requirement and license term by a specified number of years. See, e.g., 47 CFR § 27.14(s)(3).

⁶ See, e.g., *supra* notes 1, 3.

⁷ The Commission's auctions procedures public notices remind prospective bidders of these due diligence obligations. See, e.g., *FCC Announces Auction Schedule for the General Wireless Commc'ns Serv.*, Public Notice, 12 FCC Rcd 21913, 21914 (WTB 1997); *Auction of Automated Mar. Telecomms. Sys. Licenses Scheduled for Aug. 3, 2005*, Public Notice, 28 FCC Rcd 7811, 7823 (WTB 2005); *Auction of Advanced Wireless Servs. (AWS-3) Licenses Scheduled for Nov. 13, 2014*, Public Notice, 29 FCC Rcd 8386, 8403, para. 46 (WTB 2014).

⁸ See *id.*

⁹ 47 CFR § 1.946(e)(1). See also, e.g., *Bristol MAS Partners*, Order, 14 FCC Rcd 5007, 5008-10, paras. 5-8 (WTB 1999) (*Bristol*) (denying extension request given licensee failing to obtain equipment based on vendors that it chose); *Eldorado Commc'ns, L.L.C.*, Order, 17 FCC Rcd 24613, 24616-19, paras. 7-13 (WTB 2002) (*Eldorado*) (denying extension request given licensee's delays in ordering equipment and decision to change the type of technology that licensee would use); *Redwood Wireless Minnesota, L.L.C.*, Order, 17 FCC Rcd 22416, 22417-23, paras. 3-13 (WTB 2002) (denying extension request because of licensee delays in constructing due to business disputes); *Motient Commc'ns*, Order, 19 FCC Rcd 13086, 13089-93, paras. 8-15 (WTB 2004) (*Motient*) (denying extension request because of licensee delays due to various reasons, including general economic downturn, lack of financing, and purported lack of available equipment); *Warren C. Havens*, Order, 27 FCC Rcd 5841, 5848-52, paras. 16-25 (WTB 2012) (*Havens*) (denying extension request based on licensee delays due to purported lack of equipment and business decisions about which technology to deploy), *recons. denied*, Order on Reconsideration, 29 (continued....)

not qualify as grounds for an extension: “failure to obtain financing, to obtain an antenna site, or to order equipment in a timely manner,”¹⁰ or “because the licensee undergoes a transfer of control . . . or intends to assign the authorization,” or “to allow a transferee or assignee to complete facilities that the transferor or assignor failed to construct.”¹¹

Consistent with the specific caveats in the rule, the Commission examines carefully claims that failures to meet construction requirements were due to causes beyond the licensee’s control. For example, as precedent has made clear, circumstances beyond the licensee’s control also generally exclude the market’s failure to accommodate the licensee’s specific business plan, such as in the event of a general economic downturn or delays given the type of technology a specific licensee has chosen.¹² The FCC has also made clear that we evaluate with care claims made concerning the unavailability of equipment.¹³ For example, a licensee’s own choice regarding which technology to support or whether any equipment is even worth deploying will generally not suffice to warrant an extension.¹⁴ We also have denied extension requests filed on an untimely basis and those requests reflecting a lack of substantial progress.¹⁵

As with other Commission rules, requests to waive the requirements of the wireless construction rules must “meet a high hurdle at the starting gate.”¹⁶ Specifically, we remind parties that the Commission’s rules permit the grant of a waiver request only “if it is shown that: [t]he underlying purpose of the rule(s) would not

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FCC Rcd 1019, 1029-32, paras. 21-27 (WTB 2014); *Highland Holdings, LLC*, Memorandum Opinion and Order, 27 FCC Rcd 14184, 14187-91, paras. 8-19 (WTB 2012) (*Highland*) (denying extension request because failure to order equipment and decision not to construct was choice within licensee’s control); *Intelligent Transp. and Monitoring Wireless, LLC*, Order, 31 FCC Rcd 11528, 11531-40, paras. 10-27 (WTB 2016) (denying extension request for various reasons, including that the licensee pursued business plans based on unsupported technology, lack of demand for services licensee sought to offer, delayed purchase of equipment until close to the construction deadline, and failure to construct any facilities or offer any service); *Gilpin Cnty. Sheriff’s Office*, Order, 29 FCC Rcd 96, 97-98, paras. 8-13 (PSHSB 2014) (*Gilpin*) (denying extension request that was based on the licensee’s reliance on a waiver supplied to another licensee without sufficient linkage between the facts of both licensees’ circumstances).

¹⁰ 47 CFR § 1.946(e)(2). See also, e.g., *Bristol*, 14 FCC Rcd at 5008-10, paras. 5-8 (lack of equipment); *Eldorado*, 17 FCC Rcd at 24616-19, paras. 7-13 (lack of equipment); *Havens*, 27 FCC Rcd at 5848-52, paras. 16-25 (lack of equipment); *Motient*, 19 FCC Rcd at 13089-93, paras. 8-15 (lack of equipment and financing); *Highland*, 27 FCC Rcd at 14187-91, paras. 8-19 (lack of equipment).

¹¹ 47 CFR § 1.946(e)(3). See also, e.g., *Rachael E. Schwartz*, Letter, 20 FCC Rcd 12325, 12326-27 (WTB 2005) (denying extension request given unsuccessful attempts to assign and failure to obtain equipment).

¹² See, e.g., *Motient*, 19 FCC Rcd at 13089-93, paras. 8-15 (general economic downturn); *Havens*, 27 FCC Rcd at 5848-52, paras. 16-25 (business decision regarding technology chosen); *Eldorado*, 17 FCC Rcd at 24616-19, paras. 7-13 (business decision regarding technology chosen).

¹³ See *supra* note 10.

¹⁴ See *supra* note 10. See also *Progressive Commc’ns*, Order on Reconsideration, 28 FCC Rcd 11176, 11180-81, paras. 13-15 (WTB 2013)(Application for Review pending) (*Progressive*) (affirming denial of extension request where, among other things, licensee made clear that even once it received equipment and if it received an extension, it would not construct until it had a customer).

¹⁵ See 47 CFR § 1.946(e) (requiring timely filing of extension request). See e.g., *Tom Craig*, Letter Order, 24 FCC Rcd 13503, 13504 (WTB 2009) (denying extension request, in part because the licensee failed to timely file an extension request or to explain the reason for its untimely filing); *Pioneer LMDS, LLC*, Memorandum Opinion and Order, 27 FCC Rcd 12932, 12935-38, paras. 8-18 (WTB 2015) (denying extension request, in part because the licensee failed to construct any facilities prior to the deadline); *Progressive*, 28 FCC Rcd at 11180-81, paras. 13-15 (same); *Highland*, 27 FCC Rcd at 14187-91, paras. 8-19 (same).

¹⁶ See *WAIT Radio v. FCC*, 459 F.2d 1203, 1207 (D.C. Cir. 1972).

be served or would be frustrated . . . and that a grant . . . would be in the public interest; or [i]n view of unique or unusual factual circumstances, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.”¹⁷ While each case must be determined in light of its specific circumstances, we emphasize that the public interest in connection with the construction rules includes the impact of a request on the Commission’s important statutory responsibilities and policy objectives.¹⁸ These include, but are not limited to, the efficient and productive use of spectrum, and provision of timely and innovative services, particularly in unserved areas, including rural and tribal ones.¹⁹ Accordingly, we will continue to scrutinize all extension or waiver requests carefully and in light of the Commission’s mandate to ensure that licensees are utilizing spectrum consistent with the public interest.

By the Acting Chief
Wireless Telecommunications Bureau

¹⁷ See 47 CFR § 1.925(b)(3). See also, e.g., *AAT Electr. Corp.*, Memorandum Opinion and Order, 93 FCC 2d 1034, 1046-48, paras. 45-48 (1983) (denying waiver request premised on claim of problems with obtaining equipment and reliance on staff statements that the licensee would not be bound by construction obligations), *aff’d*, *P&R Tremmer v. FCC*, 743 F.2d 918, 928-32 (D.C. Cir. 1984); *Texas Two-Way, Inc.*, Memorandum Opinion and Order, 98 FCC 2d 1300, 1303, para. 9 (1984) (denying waiver request in light of delay in addressing interference at site), *aff’d sub nom.*, *Texas Two-Way Inc. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985); *Eldorado*, 17 FCC Rcd at 24616-19, paras. 7-13 (denying waiver request for various reasons, including that the licensee was only in preliminary stages of construction toward the end of the construction deadline, despite holding them for years; service was being offered by others in the areas, meaning that granting licensee’s request was not going to result in appreciable benefit of service being offered; the licensee was not serving any customers; and the licensee’s delay in acquiring equipment was its own decision and failed to account for standards changes expected to be part of wireless business); *Motient*, 19 FCC Rcd at 13089-93, paras. 8-15 (denying waiver request because the economic downturn resulting in the licensee’s financial difficulties were not unique or unforeseeable and permitting licensee to retain licenses until it become more cost-effective to build would not be in the public interest); *Havens*, 27 FCC Rcd at 5848-52, paras. 16-25 (denying waiver request because the licensee chose to deploy a particular type of technology and there was a lack of evidence that the “shifting plans” would lead to spectrum use in the near future); *Gilpin*, 29 FCC Rcd at 97-98, paras. 8-13 (denying waiver request because of lack of any explanation for why the licensee failed to meet construction obligations).

¹⁸ See, e.g., 47 U.S.C. §§ 301, 309.

¹⁹ See, e.g., *supra* notes 1, 3.